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In The
Supreme Court of the United States
October Term, 1956

No. 471

R. D. McALLISTER & SON, a Partnership, and
IRENE MARKOPOLOS,
Petitioners

v.

CITY OF ERIE,
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 696

R. D. McALLISTER, a Partnership, and
IRENE MARKOPOLOS,

Petitioners

v.

CITY OF ERIE,

Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

In conformance with Rule 40, Respondent, the City of Erie, Pennsylvania, submits the following Reply to the Petition for Writ of Certiorari filed by Petitioners, McAllister and Markopolos to No. 696 October Term 1964:

(a) The Supreme Court of Pennsylvania adopted as its own the "able" opinion of Judge Burton R. Laub of Erie County. This decision, including Judge Laub's opinion in its entirety is now officially reported in Atlantic Reporter Advance Sheets (thirteen pages), *City of Erie*

v. R. D. McAllister & Son (Pennsylvania, 1964), 204 A. 2d 650.

(b) The time in which to file Respondent City of Erie's Reply to the Petition for Certiorari filed by Petitioners McAllister and Markopolos was extended under Rule 34 by the Clerk of the Supreme Court of the United States to and including January 15, 1965.

(c) No change.

(d) The "Questions Involved" as seen by Respondent are quite different from those presented by Petitioners:

QUESTIONS INVOLVED

1. Can the Supreme Court of the United States consider alleged constitutional questions when they were not presented to the Erie County trial Court and were *raised for the first time in McAllister's exceptions to the decision of the trial court on review of its decision by the Erie County Court sitting en banc?*

(Assuming the foregoing "threshold" question is answered in the affirmative, the following questions are raised by this Petition for Certiorari.)

2. Can there be a deprivation of a property right without due process (in violation of the XIV Amendment) where there has been a contract between parties (and their predecessors), where the parties themselves (according to the courts below), by their course of action over the years, have placed a practical construction of validity on the contract now sought to be challenged as violative of federal due process limitations?

3. Assuming that the due process limitations of the XIV Amendment can be stretched in concept to impose a taking-without-compensation type limitation on the State of Pennsylvania, where the "taking", if any, grows out of a contract respected by the parties themselves (or their predecessors) over the years, has there not been

(a) consent to such "taking", or

(b) a waiver of compensation for such "taking"?

4. Can a yacht and marine sales and servicing business be such an instrumentality of interstate or foreign commerce that any effort of the state to impose special taxes or assessments on it may be struck down as a burden on such instrumentality—or on any of its commerce with an out-of-state customer?

ARGUMENT

1. Petitioners are met at the threshold of their appeal to the Supreme Court with the stopper that they raised no federal question at the threshold of their cases in Erie County Court. Judge Laub was afforded no opportunity to consider the alleged violation of federal limitations on the state's authority to impose special taxes or assessments on property owners. (However, even though raised before the Court en banc, Petitioners' assertion of federal question was not considered cogent enough to warrant comment; nor indeed by the Pennsylvania Supreme Court, which is notably sensitive to the lurking presence of any valid federal question.)

The "threshold" rule is not a mere procedural gimmick. Its genesis is found in the reflection that if a question is not important enough to call to the attention of the Court below, it is probably an afterthought.

The City of Erie respectfully submits that this Petition should be rejected at the threshold.

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2. However, should this Court consider that raising the so-called constitutional questions for the first time on the occasion of taking exception to the Court's decision below is timely, then the following argument is submitted in support of Respondent City of Erie's position that the Petition for Certiorari be dismissed:

To clear away some debris:

Argument

The Fifth Amendment imposes no limitation on state action and is irrelevant here.

So with the Commerce Clause. It is admitted (page 13, bottom) that Petitioner Markopolos "is not in interstate commerce". As to Petitioner McAllister, it can hardly be seriously urged that by selling fuel to, or repairing, an occasional yacht or motor boat from "out state" Petitioner McAllister can place himself beyond the Commonwealth's power to levy special taxes or assessments on his property. Even if the argument be advanced that an unreasonably large special assessment could constitute an improper burden on Petitioner's ability to serve his interstate customers (and inferentially therefore that no such individual could make a valid voluntary contract to accomplish unreasonably large repairs in lieu thereof) it is suggested that this is not the forum in which to review in the first instance any such issue of reasonableness.

There remains for consideration then only the due process limitation of the XIV Amendment: How has this been violated?

Petitioners have had their day in court.

The Court below has interpreted their contracts as accepting (in addition to the payment of the usual real estate taxes) the burden—whatever it may be or become—of accomplishing and financing repairs to the pier in lieu of paying special taxes and assessments for this purpose —and the Court considered further that this burden runs with ownership of the land. (The Court noted, inter alia, that it accepts the interpretation put upon the contract by the Petitioners themselves.)

Petitioners bought into this situation. The fact that their purchase has turned out to be (in their present

view) evidently unwise, does not make it in any sense violative of federal due process limitations. Nor does it make sense because Petitioners have entered into a bargain which *they* now think is unduly burdensome, that the established and time-honored and well-understood status of property ownership on Erie's waterfront should be disrupted. Others may not think Petitioners' "burden" unduly burdensome. Petitioners can always do what their respective predecessors did: sell their property.

As noted, any issue of "taking" (with or without compensation) is not seen as being realistically in this case. But should the due process limitations of the XIV Amendment be somehow expanded to encompass the concept of a taking-without-compensation type of objection, it is difficult to identify here the subject of the alleged "taking".

Petitioners say at page 8 of their Petition for Certiorari:

> "Maintenance of the public dock has become disproportionate to the original intent."

Can they mean that a contract voluntarily entered into, and up to now viable, has suddenly, because of an increase in the burden, become an unlawful taking. We had supposed that the concepts of a *contract,* however unwise (implying consent) and a *taking* for public use (in disregard of consent) were mutually exclusive on that issue.

Respectfully submitted,

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